No. 15,178

IN THE

United States Court of Appeals

For the Ninth Circuit

ONG WAY JONG, alias JOHNNY ONG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S OPENING BRIEF.

The Grand Jury of the Northern District of California presented an indictment against appellant and one Wee Zee Yep. The indictment contains three counts, but we ignore the first and second, as they are against Wee Zee Yep alone. The third Court charges the two defendants under Section 371 of Title 18, United States Code (the conspiracy statute) with knowingly and wilfully conspiring together "to sell, dispense and distribute, not in or from the original stamped packages, quantities of narcotic drugs, to-wit, heroin, in violation of Sections 4704 and 7237 of Title 26, United States Code, and to conceal and facilitate the concealment and transportation of quantities of narcotic drugs, to-wit, heroin, which had been

imported into the United States of America contrary to law in violation of Section 174 of Title 21, United States Code." (TR 4.)

Four overt acts were alleged: (1) on or about February 1, 1956, at San Francisco, California, defendant Wee Zee Yep sold a quantity of heroin for the sum of $600; (2) on or about February 1, 1956, defendant Wee Zee Yep entered a residence at 83 Winfield Street, San Francisco, California; (3) on or about February 1, 1956, in the City and County of San Francisco, defendants Wee Zee Yep and Ong Way Jong, alias Johnny Ong, traveled together in a 1951 Cadillac coupe bearing California License No. CKC 040; (4) on or about February 1, 1956, defendant Wee Zee Yep met defendant Ong Way Jong, alias Johnny Ong, at 1003 Jackson Street, San Francisco, California. (TR 5.)

This indictment was returned March 7, 1956, and appellant pleaded not guilty thereto on March 8. A jury having been waived, the cause came on to trial on April 25 and 26, 1956, and both defendants were found guilty as charged. (TR 213). Appellant filed a motion for a new trial on May 4, which was denied May 10, 1956, and appellant was sentenced to five years imprisonment and a fine of $1. He filed his notice of appeal to this Court on May 17, and has brought up the complete record and all the proceedings and evidence to this Court.

JURISDICTIONAL STATEMENT.

(1) The statutory provisions believed to sustain the jurisdiction.

(a) **The jurisdiction of the District Court.** Title 18, Section 3231, United States Code, which provides:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

Also, the Constitution of the United States, Amendment VI:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

(b) **The jurisdiction of this Court upon appeal to review the judgment in question.** Section 1291, Title 28, United States Code provides:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1294 of Title 28:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeal as follows:
>
> (1) From a district court of the United States to a court of appeals for the circuit embracing the district."

(2) The pleadings necessary to show the existence of the jurisdictions.

The indictment. (TR 3.)

(3) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question.

These facts are set forth at the outset of this brief, and a restatement of the indictment, the plea and the judgment and orders of the District Court are omitted in the interest of brevity.

ABSTRACT OF THE CASE.

The cause, as heretofore stated, came on to trial the 25th day of April, 1956, before Honorable Michael J. Roche, District Judge, sitting without a jury, a trial by jury having been waived by both defendants. Thereupon counsel for the Government made the following opening statement:

> "Mr. Constine. May it please Your Honor, inasmuch as this is a conspiracy case plus the substantive offenses, I wish to make a brief opening statement of what the Government intends to prove.
>
> This indictment was returned by the Grand Jury in three counts. It charges the defendant Yep with the transfer of a quantity of heroin on February 1st of this year; the second count charges him with the possession of that heroin, while the third count charges the defendant Yep and the defendant Ong with conspiracy to violate the narcotic statutes.

The defendant Yep has pled guilty to the possession of the heroin. However, he has pled not guilty to the transfer of that heroin, and he and Ong has pled not guilty to the conspiracy count.

I might say that this will be a relatively simple case. Much of the proof in this particular indictment will center around the transaction of February 1st. The primary witness, Your Honor, for the Government will be Wilton Wu, who sits at my left, a United States Treasury agent who in this case operated in an undercover capacity pretending to be a narcotic purchaser from Denver, Colorado.

The evidence that will be introduced will show that the defendant Yep is a narcotic peddler of some substance, having been selling heroin in this community in large quantities for approximately four years.

The proof will show that he had a number of sources for his heroin, one source Caucasian seaman who sailed between Hong Kong and the United States. I might state, just as an aside, that that was the case that was before Your Honor yesterday—the activities of this defendant and the seaman, Mr. Houk, who I might say pled guilty before Your Honor yesterday. However, the defendant had other sources of narcotics within this community, and it is the Government's contention, of course, that one of these other sources was the defendant Johnny Ong.

In the middle of January Mr. Wu, in the undercover capacity, we will show met the defendant Yep and negotiated for a sale of narcotics, which actually took place. Yep explained that

his seaman friend, the man that was before Your Honor yesterday, was still out at sea and not available, and, therefore, he had to turn to another connection, a good friend of his that he had in San Francisco. We will show that other connection was the defendant Johnny Ong.

On January 23rd we will show that Mr. Wu purchased from Mr. Yep two ounces of heroin. On February 1st we will show that Mr. Wu purchased another ounce of heroin from Mr. Yep, and it is on this transaction that the agents observed Mr. Yep and Mr. Ong in the conspiracy as both defendants were under constant surveillance for the most part during that day, February 1st.

Now the remaining link—the proof will show that the defendant Yep identified the defendant Johnny Ong as his connection, as one of his sources of narcotics, and he described him as an unemployed, ex-bookie, gambler, who owned a 1955 Cadillac and who had no job at the particular time.

I say that because the Government will show that it was this 1955 Cadillac that was offered by the defendant Yep as security in the narcotic transaction with Mr. Wu. We will also show that after an additional sale when both defendants were apprehended and arrested, the defendant Ong was confronted with the fact that the agents believed him to be involved in this narcotic transaction on February 1st, they accused him of delivering the narcotics to Mr. Yep, and in the light of this accusation the defendant remained silent and made no statement or explanation at all, although he did admit that he had had no job for over a year and was unemployed.

> There are a number of agents that the Government will call in this case, Your Honor. It will be something that can be compared to a jigsaw puzzle. Each agent can only tesify to what he saw or what he observed; it will not be until all the agents testify before Your Honor that the complete picture of the defendant Ong's guilt and the defendant Yep's guilt will be made clear." (TR 24-27.)

Thereupon counsel for defendant Ong moved for a dismissal and for a judgment of acquittal on the basis of the Government's opening statement upon the ground that, according to the said statement, the defendant Ong merely met the defendant Yep on various occasions, and that under the authorities a mere meeting standing alone does not give rise to even an inference of conspiracy, and that hearsay evidence alone was relied upon by the Government to connect the defendant Ong with the transactions involved. (TR 27.) The Court denied the said motion, to which ruling counsel for the defendant Ong duly objected.

WILLIAM J. GOWANS, called as a witness on behalf of the Government and being first duly sworn, testified:

I am a chemist employed by the United States Treasury Department, and have been so employed for fifteen months. I worked as an analytical chemist for approximately ten years. (TR 30.) Heroin is a narcotic. It is a derivative of opium. I have brought with me two exhibits at the request of the United States

Attorney. (Thereupon wo packets were marked for identification as Government's Exhibits 1 and 2.) I received Exhibit No. 1 on January 24, 1956, and Exhibit No. 2 on February 2, 1956, from Agent Wu of the Bureau of Narcotics. It contains 70 per cent heroin. Exhibit 2 contains 1 ounce, 36 grains of heroin. The packets were sealed in my presence. I broke them when I performed the analysis and then I resealed them. (TR 33.)

MILTON K. WU, called on behalf of the Government, testified:

I am a Treasury Agent with the Bureau of Narcotics, and have been employed in that capacity the past year. I am now assigned to the San Francisco Field Office of the Bureau of Narcotics. I know the defendant who sits at the right of the United States Attorney (the defendant Yep) by the name of Rocky. (RT 37.)

Thereupon the following proceedings occurred:

"Q. Did you have a conversation with him?

A. Yes, I did.

The Court. Time and place.

Mr. Constine. Pardon me, Your Honor?

The Court. Time and place. Let us fix that.

Mr. Constine. I will.

Q. What time was that that you had the conversation with him?

A. About 7 o'clock.

The Court. And the date?

Mr. Constine. January 15th, Your Honor.

Q. In the Pagoda Bar, is that correct?

Mr. Riordan. If it please the Court, in order that I won't have to constantly interrupt, I want

to object to all the past testimony and any further testimony by Mr. Wu along this line as to his meeting with Mr. Rocky Yep and any conversation he had with Mr. Yep on behalf of my client.

Mr. Constine. It is understood you have an objection to the whole series of transactions.

Mr. Riordan. That is right. So I will not interrupt.

The Court. The objection is overruled."

The witness (continuing): No one besides myself was present during the conversation. He asked me what I was looking for and I said, "Well, let's go up to my apartment and we can talk better up there." So we walked to my car and proceeded up to my apartment at 225 Chestnut Street. No one was present besides Mr. Yep and myself. I asked him about the sample that I received and why it was so small, and he claimed he didn't open it to look at the quantity. And I asked him what happened to my shipment of narcotics that I was promised. He said he sold it. However, he was expecting another shipment within three weeks or so; that his connection was a white seaman working on a freighter which was due in about three weeks. (Tr. 39.) He assured me I will have first option on that shipment—I questioned him as to the reliability of his connection, and he assured me that he had other connections in the city; that he can always purchase narcotics for me. So I ordered—I told him to get me two ounces to tide me over until the ship came in, and he agreed and said he will locate some for me. I saw the defendant Yep again on Jan-

uary 23, 1956 at the same place where I mentioned before. That was my apartment. That was approximately 8:30 in the evening. (Tr. 40.) No one else was present in the immediate room. Agent Wolski was in a connecting room monitoring our vocal activities. Mr. Yep told me that he has made arrangement to deliver me two ounces and he is ready to go, and that he expected to contact his contact approximately 9:15 or so. So he left about that hour. He mentioned his seaman connection is still coming in, due in any time. He says that he has to make other—his other connection that is locally to get the stuff. He didn't use the word "heroin"; in the trade the word "stuff" means the narcotics. Mr. Yep left at that time and returned approximately an hour later and he delivered me two ounces of narcotics. (Tr. 42.) I paid him $1100. That is the defendant Rocky Yep. Government's Exhibit 1 for identification is the package that I sealed myself and my initials are on the packet. (Tr. 43.) These are the two packages I received. I identify them by my initials on them and that date.

Thereupon the following proceedings occurred:

"Mr. Riordan. Yes, but I don't know if I mentioned it before—I would like to now add the additional objection to all this testimony as being hearsay against my client.

The Court. The objection will be overruled.

Mr. Riordan. And it is understood that that objection runs to the rest of this testimony?

Mr. Constine. Yes, that is agreeable with me."

The witness. I told him I was leaving town; that I would contact him when I get back in town again.

He said all right. That was January 23. (TR 44.) On February 1st, I called the defendant Yep in the morning and told him I was back in town. So we agreed to meet in my apartment later on in that afternoon. He appeared at approximately 2 o'clock in the afternoon at my apartment at 225 Chestnut Street. This particular apartment has a living room, bedroom, bathroom and a hallway and a kitchen. The so-called listening post was adjacent to the hallway. (TR 44.) A listening post consists of master controls that are directly connected to microphones located in each room in this particular apartment, so a person at the listening post could hear conversations in other parts of the apartment. I had a conversation with Mr. Yep at that time. I told him that I would like to order another two ounces of stuff. He said he will go contact his friend and get it, so he left. I saw him again about 4 o'clock in the afternoon at the apartment at 225 Chestnut Street. (TR 45.) We discussed about the price of the narcotics. He claimed my offer was a little low; that he couldn't get it for any less than $600 per ounce. (TR 46.) He told me that my offer, original offer, was too low; that he couldn't get anything for less than $600 an ounce and that he couldn't find the original connection. However, he found a secondary connection who can furnish me this stuff for $600 an ounce. I told him that was way out of line, I feel that it was a little expensive, to go back and talk to the man and see if he can bring the price down. So he left, and approximately 4:30 he called me. That was Yep. Approximately 4:30 he

telephoned me again and told me that he couldn't do anything, that the price would have to stand. I told him that, "since I have to leave town, I do want the stuff, go ahead and get it." And so he said, "O.K.". Approximately 5 o'clock he came back and told me he has already passed the order on; however, he won't be able to make delivery until later on that evening. So we set a meeting to meet later on that night at Compton's Restaurant about 8 o'clock, and he departed. About 8:15 I was at Compton's Restaurant located on Van Ness and Geary. The defendant Yep came in and told me that he was still negotiating trying to get delivery to me; that he was sure he could make it later that evening, for me to wait for his call at my apartment. (TR 48.) I heard from him approximately 9:30. He made a telephone call to me and he assured me that he was going to make delivery within the hour and that he was waiting for a man to come back with the stuff now and be sure and wait for him. He said he had saw (*sic*) the man, that he has placed the order and he is expecting the stuff to return to he could bring it up. (This is the language of the witness as it appears in the transcript. I did not see Mr. Yep again until approximately 10:15 that night. I saw him at my apartment. (TR 48.) This was February 1. He returned to the apartment and delivered to me one ounce of narcotic, Government's Exhibit 2 for identification. There is a rubber container in there that I initialed. This white powder is heroin. I paid $600 in official advanced money for this particular quantity of heroin. He said he has to

return to the man, and left my apartment. I didn't describe that man or say what man. I had occasion to see Mr. Yep again on February 7, 1956, at my apartment, 225 Chestnut Street, at approximately 11:30 in the morning. We discussed about future deliveries and general topics of narcotics, and among one of the things he told me was his friend was going to buy a 1955 Cadillac with a canary yellow bottom and a black top. (TR 50.) He claims that he advised this friend against purchasing such a car because it was too flashy; that his friend was dealing and didn't have any other job and it would just call attention upon himself. In the trade "dealing" means a man who is selling narcotics. Mr. Yep said the man who was purchasing the car was dealing. He did not say whether this was his connection or not. He merely mentioned him as his friend. (TR 51.) On February 7 he called me and told me he couldn't see me until later that evening, and that would be about 7 o'clock. He came up and told me that he has contacted his connection and placed my order. However, he has to wait until he heard from the man; that he left the man at a Mah Jong game. To kill some time Mr. Yep and I went out to dinner at the Gino Restaurant on Columbia. (TR 51.) Then the defendant Yep dropped me off at the apartment and stated that he was going to join his connection and see if he can get my order filled. Approximately 8:30 he called and said he hadn't made any positive connection yet but he would contact me later. He did not contact me later on that night to my recollection. (TR 52.) About noontime on

the 8th Yep telephoned me at my apartment, and told me he was with his connection right then and that they are trying to get the stuff to make delivery to me; that he will call me later on in the afternoon. He called me that evening and said they haven't made any headway yet; that he will call me again next day. On the 13th early in the morning the defendant Yep came to my apartment and we discussed about this long delay he has been keeping me waiting for three or four days now and I questioned him as to his reliability of his connection, got his narcotics first, why couldn't he get me any more; he told me that he could get it for me at any time I wanted. He said he trusts his connection he is working with, the man is reliable, not only a good connection but a good friend of his; he used to be an ex-bookie, he is well off, he is loaded, is the word he used, and that he used to work in a cannery and no one knows the man is dealing, and he is a perfectly good connection to have. I said, "Be so good as to call him and get him on the phone and get my narcotics." He says he can't call the man because he didn't have a telephone; he would have to see the man. (TR 53-54.)

Thereupon the following proceedings occurred:

"Mr. Riordan. Again I am going to object vigorously and renew my objection on behalf of Ong as to the introduction of hearsay statements which are made obviously—and when you start referring to some other man I think it is quite evident that they are attempting to refer to the co-defendant here which must be Ong. There has been absolutely no proof of any conspiracy, so

therefore any acts or declarations on the part of Mr. Yep which come to this Court through Mr. Wu are highly objectionable at this point as being introduced.

Mr. Constine. May it please Your Honor, this objection is running to all the testimony, as I understand it, until we put the other agents on the stand.

The Court. Unless it is connected up, it will go out. Your objection at this time will be overrulled." (TR 54.)

The Witness (continuing). I received a phone call from Yep later that evening. He told me that he didn't expect that he could deliver that night and I told him that I was leaving town, that "I wish you would give me a positive statement whether you could or could not get the stuff." I heard over the telephone he called someone by the name of Johnny, and then they spoke something which I did not hear. And then he came back on the phone and told me, he said definitely he couldn't get anything that evening. That was the extent of the telephone conversation. On February 17 about mid-morning the defendant Yep and myself was at the Mordern Cafe located in Chinatown. We discussed the delivery of narcotics and the defendant Yep told me that he has a shipment lined up for me; however, the man required payment in advance. I told him that I didn't do business that way; that I liked to see the merchandise before I buy it, and that under no circumstances I was going to pay for something I have not seen. He told me that his other connection was willing to put up a 1955 Cadillac

as collateral, was willing to sign the pink slip over as collateral for the shipment, and he can get me that particular shipment. I told him I didn't care how he made the arrangements as long as I could get the narcotics and look at it, and if I like it I will pay him cash on the line. So he said he was going back and see if he can set it up. (TR 56.) On the 19th the defendant Yep came up to my apartment at 225 Chestnut Street, and again I questioned the defendant Yep as to the reliability of his connection again. He told me that he is expecting shipment in on a ship; that if that failed to arrive he still has this other deal where he had this friend putting up the Cadillac as collateral; that we can always count on that in case we missed the boat shipment.

Thereupon, counsel for the Government offered evidence of a transaction between the witness and Yep on February 21, stating that the evidence was offered against Yep only. (TR 58.)

The Witness (continuing). I did not see the defendant Johnny Ong at any time prior to his arrest. (TR 61.)

BRUCE E. HIPKINS, called and sworn on behalf of the Government, testified: I am a Federal Narcotic Agent assigned to the San Francisco Field Office. I saw the defendant Yep on February 1, 1956, at approximately 2:00 p.m. He drove up to 225 Chestnut Street. I did not see him enter the apartment. I saw him drive up to it. I did not see him get out of his car. I observed Rocky driving from the address approximately 15 or 20 minutes after I first saw him.

(TR 79.) He drove directly to 83 Winfield Street. (TR 80.) That is the address of the defendant Johnny Ong. I saw him enter a doorway there. I saw him leave there and drive to Mason Street between the intersection of Jackson. I saw the defendant Johnny Ong at approximately 3:55 p.m. on that day driving a '51 Caddillac with a dark top and light bottom. I know the license number CKC 040. At that time the defendant Yep got into the car. He was parked there and he got into the car with the defendant Ong. (TR 81.)

Thereupon the following proceedings occurred:

"Mr. Riordan. If it please the Court, again as to all the testimony that has been had in the past in relation to this witness, I hereby object to the same as being incompetent, irrelevant and immaterial and as to the defendant Ong being hearsay.

Mr. Constine. This time, Your Honor, he is testifying to what he saw the defendant Ong do. That is not hearsay.

Mr. Riordan. That goes to competency and relevancy; hearsay insofar as seeing Yep make these various trips. I object to that on the ground of the fact that there is no foundation laid as to any conspiracy being involved and presented at this particular time.

The Court. The objection will be overruled." (TR 81.)

The Witness (continuing). I observed the defendant Yep here. He had parked in his 1952 Mercury, License No. CKB 445, on Mason near the intersection of Jackson. At approximately 3:55 I saw the defendant Johnny Ong drive up in his Cadillac. At

that time the defendant Yep got into the car with Ong and they drove around for approximately five minutes. (TR 82.) I next saw the defendant Yep get out of the car and get into his. I followed the defendant Ong to Chinatown where he parked his car on Washington near Waverly. I saw the defendant Yep again on that day leaving the apartment at 225 Chestnut Street approximately 4:30 p.m. I followed him. He went to the intersection of Francisco and Powell. He got out of the car and was lost to my view; he was covered by other agents. I saw him again approximately 5 o'clock when he drove to 225 Chestnut Street. That was Mr. Wu's address. I saw the defendant Yep riding in the defendant Ong's Cadillac at the vicinity of John and Mason Street, approximately 7:30 in the evening. (TR 83.) I saw the defendant Ong driving his Cadillac. He drove around and then returned the defendant Rocky to the vicinity of John and Mason. The car stopped and the defendant Rocky got out. I saw the defendant Yep at approximately 8:30 p.m. leaving Compton's Restaurant, at which time he drove to the intersection of Jackson and Mason. He got out of his car and walked across the street and was lost to my view. I did not see him again for approximately five minutes when he returned to his car. I did not see the defendant Ong at that time. (TR 84.) I saw a Cadillac of this same color and year drive away from there, but I couldn't say it was definitely him or his car. (TR 84.) There were other agents present. After I saw this Cadillac drive away, Yep got into his car and stayed there for a

while and back onto the street corner in just a period of an hour or a little better where he was in the car or on the street, just walking back and forth between the two. And at one time he walked across Jackson out of view and then stayed for three or four minutes and then came back to the car. I saw the defendant Ong at approximately 10 o'clock p.m. driving his Cadillac close to the intersection of Jackson and Mason, where Yep was waiting. (TR 85.) The defendant Ong parked the automobile on Jackson right on the corner of Mason and walked across the street with a child in his arms. And as he got across the street he was joined by the defendant Rocky and the two of them walked into the doorway at 1003 Jackson. They stayed in there for approximately a minute. The defendant Rocky came out of the doorway, got into his Mercury and drove directly to 225 Chestnut Street. (TR 85.) In the space of ten minutes or so I next saw the defendant Yep driving from 225 Chestnut Street back to the same corner, Jackson and Mason, and we were slightly a little bit behind. By the time we got up close we saw the defendant Rocky and Ong there get into the Mercury and drive around for several blocks in the space of just a few minutes. (TR 86.) Then the defendant Ong was returned to the corner of Jackson and Mason, at which point the surveillance discontinued. On February 7, 1956, I saw the defendant Yep go to 225 Chestnut Street at approximately 11:20 a.m. He stayed there until approximately 12 o'clock. At that time I followed him from 225 Chestnut Street to Bay Meadows Racetrack. He

stayed there from approximately 1 o'clock till about 5:20. The defendant Ong joined defendant Rocky at the racetrack. (TR 86.) I saw the defendant Yep leave there about 5:20 p.m. Mr. Ong was not with him at that time. Yep went from there to 83 Winfield and stayed there a few minutes. Then he went to Chinatown area and went to this Mah Jong place at 31 Spofford Alley. I saw him park his car in that vicinity and he was out of sight. I saw him coming out of that place and I followed him to 225 Chestnut Street and observed him go to the address. Then he left in the company of Agent Wu and went to a restaurant over on Green Street. (TR 87.) Then he returned with Agent Wu to 225 Chestnut Street, and from there he went back to the Mah Jong place at 31 Spofford Alley. I didn't see him enter. I saw him come from it at approximately 9:15 p.m. in the company of Johnny Ong. They walked to Clay Street and stood by a 1955 Cadillac, black top, yellow bottom, License No. 1L-23456. (TR 88.) My surveillance ended after the two of them walked down to the defendant Yep's Mercury. (TR 88.) On February 22, 1956, I had occasion to arrest the defendant Johnny Ong in the presence of Agent Wolski. We arrested him in front of his home at approximately 4:30 a.m. on the 22nd of February. He had just drove up (*sic*) in his 1955 Cadillac. After the arrest while we were searching the place for narcotic contraband, we interrogated Johnny Ong. We had no search warrant. (TR 89.) I am not sure whether a complaint had been filed before the Commissioner. I don't know whether we had a warrant

for his arrest. We told him he was under arrest. We identified ourselves and said he was under arrest and had been implicated in the narcotic transactions with the defendant Rocky Yep. This was on the same night, extending into the next day. Rocky was arrested on the 21st late and this was 12:30 a.m. on the 22nd. I don't know whether he was brought before the Commissioner on the 23rd when the Commission was in session. After the arrest we booked him at the County Jail. (TR 90.)

Thereupon the following proceedings were had:

"Mr. Constine. Q. Will you kindly repeat the conversation? Tell us what was said.

A. At that time I accused the defendant Ong of delivering a quantity of narcotics to Rocky on February 1st and it was my opinion that the night—

Q. Wait; is this what you were telling him?

A. Yes; it was my opinion that he had concealed the narcotics in the diaper of the child due to the fact that yellow stains were found on the container.

Q. This was what you had advised Mr. Ong?

A. Yes, and at this time—

Q. Go ahead.

A. At this time his wife came in and said that 'I told you you would get into trouble'—

Mr. Riordan. I am going to object again, Your Honor. May my objection go to all of this testimony as being incompetent, irrelevant and immaterial again and bringing in hearsay, and the conspiracy and the overt acts in relation to any conspiracy have not been established.

The Court. The objection will be overruled. He is entitled to what occurred at that time and place, what was said, if anything.

Mr. Constine. Q. You accused him of engaging in this narcotic transaction; is that correct?

A. Yes.

Q. And the wife said to the defendant Ong in Ong's presence, "I told you you would get in trouble"?

A. 'I told you you would get into trouble running around with Rocky.'

Q. And what if anything did Mr. Ong say in reply to your accusation?

A. He said nothing at that time.

Q. Did he make any statement at all?

A. Nothing. He said nothing." (TR. 91-92.)

The Witness (continuing). I asked him what his occupation was and he stated that he had been unemployed for the past year. I asked him how he could explain buying the house, paying cash for the Cadillac and everything, and not working. He stated his income was derived from gambling. I searched the house. I did not find any phone in the premises. (TR 92.)

On cross-examination the witness testified. I did not have a warrant to search that house. I found no contraband. (TR 93.)

ELDON R. PRZIBOROWSKI, called by the Government, testified:

I am a narcotic agent employed with the United States Bureau of Narcotics and assigned to the San

Francisco Office. I saw the defendant Ong on February 1, at about five minutes to 4:00 in the afternoon driving a Cadillac automobile, License No. CKC 040 and park on Mason Street alongside of where the defendant Yep was seated in his automobile. The defendant Yep got out of his automobile and entered the Cadillac driven by the defendant Johnny Ong. They drove around a few blocks and the defendant Yep got out of the automobile, and I followed the defendant Johnny Ong to where he parked the Cadillac automobile on Washington Street between Grant and Waverly Place. On the evening of February 1, I saw the defendant Ong driving the same Cadillac automobile west on Jackson Street and turn north out of Powell Street, turn around the corner, and then entering this alley or street called John Street and park about a fourth of the way up the street right alongside of where the defendant Yep was already seated in his Mercury automobile. That was between 7 and 7:30 p.m. (TR 103.) After Mr. Yep entered Mr. Ong's automobile, they drove around the block and the defendant Yep got out of the Cadillac automobile driven by the defendant Johnny Ong and entered his own automobile and drove off. I next saw the defendant Yep drive away from the vicinity of Compton's Restaurant on Van Ness Street. I followed the defendant Yep to the vicinity of Jackson and Mason Street where he parked his automobile on the south side of Jackson Street. The defendant Yep got out of his automobile and walked west on Jackson Street where some other Chinese people appeared on the

street, and he stayed in that vicinity for a short period of time. Then he walked across the street, across Mason Street with a Chinese I couldn't recognize. It was a Chinese similar to the defendant Ong, but I couldn't say it was Ong at that time. Then I went back to the automobile I was seated in with Agent Hipkins. Then I next noticed the defendant Johnny Ong's automobile driving away—the Cadillac. At approximately 10 p.m. I saw the Cadillac return to the area, and the defendant Ong got out carrying a small child in his arms, and he walked over to the entrance way of 1003-5-7-9 Jackson Street, and as he approached there the defendant Yep jumped out of his automobile and walked into the common entranceway side by side. In just a very short period of time, the defendant Yep came from this common entranceway and entered his automobile and drove off, and I followed him back to the apartment house at 225 Chestnut Street, where Mr. Wu was. At approximately 10:20 p.m. I saw Mr. Yep leave 225 Chestnut Street. I followed with Agent Hipkins in our automobile and we followed the defendant Yep's automobile rather loosely, and by the time we parked on Jackson Street between Mason and Powell the defendant Yep had already gotten out of his automobile and I saw the defendant Yep with the defendant Ong return and get into the defendant Yep's automobile—into the Mercury. They went west on Jackson Street and rode around either one or two blocks and then the Mercury automobile returned to the vicinity of Jackson and Mason Street. One of the occupants got out and the Mercury automobile drove off. (TR 106.)

JOHN A. STENHOUSE, called on behalf of the Government, testified: I am a Treasury Agent of the United States Bureau of Narcotics and have been so engaged for the past two years. I am assigned to the San Francisco Field Office of the Bureau of Narcotics. On February 1, 1956, I observed the defendant Yep approaching 225 Chestnut Street in a 1952 Mercury vehicle. I was seated in a 1952 Chevrolet coupe. There was a radio in the car. (TR 108.) It was equipped with a two-way radio; I could send and receive messages with other units of the same equipment. There was a unit in Mr. Wu's apartment. At approximately 2 p.m. I heard Mr. Wu's voice over the loudspeaking system in our car. I recognized it as Mr. Wu's voice. I heard him addressing a person named Rocky. There was an instantaneous reproduction of the voice.

Thereupon the following proceedings were had:

"Mr. Riordan. If it please the Court, again on behalf of my client I will now object to any and all testimony that has been received already and will be received along this line on the basis of the fact that it is incompetent, irrelevant and immaterial as to the defendant Ong, that it is hearsay and is being improperly allowed in against Mr. Ong in view of the fact that no conspiracy has been developed.

Mr. Ringole. I make the same objection. (TR 109.)

Mr. Constine. Those objections have been made, Your Honor, and I understand they are under submission; and we are connecting it up now, we are proving the conspiracy by their acts and actions. That is what we are trying to do.

The Court. I will allow that in subject to your motion to strike and over your objection.

Mr. Riordan. I am renewing this objection with every witness. If the Court states I do not have to, that it would be considered as running to all the Government evidence—

Mr. Constine. We have already said we understanding (sic) that he is objecting to all the testimony." (TR 110.)

The Witness (continuing): I recall this person addressed as Rocky to state to Agent Wu that he had three connections already lined up on ships and that he could supply at a later time any quantity of stuff that Agent Wu might wish to have. He further stated that he had another connection within the city that was a respectable family man. That is just about all the conversation I can recall. On that occasion it was all in English. The subject they were speaking about was Agent Wu being in the market for narcotics, and after a short stay the person identified as Rocky stated that he was going to pick up now. (TR 111.) Yep left 225 Chestnut Street in the previously described Mercury vehicle and drove directly to 83 Winfield Street. Later that day I saw the defendant Ong near the intersection of Mason and Jackson Streets, at approximately 3:55 p.m. I observed the defendant Yep to be parked at approximately 1254 Mason Street in his Mercury vehicle. At 3:55 p.m. I observed this 1951 Cadillac with California License CKC 040 to drive alongside, being driven by a person I later identified as Johnny Ong, and defendant Yep entered that vehicle. (TR 112.) They drove around the block about

four turns. Then the defendant Yep left the Cadillac and entered his Mercury automobile and drove back to 225 Chestnut Street. I could not see him enter. I could not see him actually leave the doorway. I saw him again on February 1 as he left 225 Chestnut Street for the second time and drove to the area of Francisco Street and Powell Street. He left his vehicle and attempted to enter the Mambo City tavern. He could not get in there, and then went to a grocery store located across the street from there. He disappeared from my view therein for a very few minutes. (TR 113.) He then entered his vehicle and again returned to 225 Chestnut Street. At approximately 7:10 on the evening of February 1, I saw the defendant Yep leave his residence, 735 Washington Street, and drive to the vicinity of 32 John Street. He parked his vehicle there, and I had a conversation with other agents in another car. I saw the defendant Ong's automobile. I couldn't identify the driver at that time. I saw the license of the automobile, and that was the same automobile I saw the defendant Ong in previously. I observed this Cadillac going west out of John onto Mason Street. (TR 114.) I next saw the defendant Yep within Compton's Restaurant at Geary Street and Van Ness Avenue at about 8:10 p.m. He was with Agent Wu, I observed them to have a conversation for about 15 minutes, and then defendant Yep left Agent Wu. Thereafter I saw him within a very short time in the vicinity of Jackson and Mason Streets. I was on foot surveillance and observed defendant Yep to approach an unidentified female accompanied by a Chinese person that I identify as

Johnny Ong in front of the common doorway at 1003 Jackson Street. I observed the defendant Ong drive his 1951 Cadillac from that area and he disappeared from my view. The defendant Yep stayed within the area until about 10:10 p.m. I observed defendant Ong return in the 1951 Cadillac and park it on the northwest corner of Jackson and Mason Streets. He crossed the street and entered the common doorway residence with the defendant Yep, who approached him simultaneously. (TR 115.) I observed the defendant Yep come out in approximately I would say a minute; he entered his Mercury vehicle and drove directly to 225 Chestnut Street. I followed him and discontinued surveillance of defendant Yep at that time. (TR 116.) On February 6, 1956, I saw both defendant Yep and defendant Ong together with another unidentified Chinese person that is employed at the Union Oil Station at Geary and Polk Streets. The three walked to the used car Cadillac Sales Company located at Polk and O'Farrell Streets. The three met with an unidentified salesman and were looking at, for over an hour, a 1955 Cadillac with license 1-L 23456. It is ivory with a dark top. That was the completion of my surveillance on that day. I next observed defendant Yep on February 7 at about 11:15 a.m. approaching 225 Chestnut Street.

Thereupon the following proceedings were had:

"Mr. Riordan. May I interrupt for a moment, Your Honor? It is my understanding I must be a little more specific; that my objection as to the competency, relevancy and materiality also goes

to the testimony of this witness in relation to his observance of my client and two other Chinese individuals going to the Cadillac automobile.

Mr. Constine. So far as the relevancy is concerned, Your Honor, the relevancy of his testimony is to identify the individual from whom Yep was obtaining his narcotics. He had described him to Mr. Wu as purchasing a new '55 Cadillac, or just about to, and this agent is testifying that he saw Mr. Yep and Mr. Ong on the day before at the Cadillac lot. And in subsequent testimony we intend to prove that he saw Mr. Ong actually driving this particular 1955 Cadillac. Its relevancy is for the purpose of identifying the individual Mr. Yep was talking about.

The Court. For that limited purpose I will allow it.

Mr. Riordan. Again, Your Honor, he is going right back to the problem of hearsay which always arises in this type of testimony.

Mr. Constine. Q. You saw Mr. Ong on Febuary the 6th?

A. Yes, sir.

Q. What happened on February the 7th, the next day?

A. At about 11:15 a.m. I observed the defendant Yep to again approach the residence at 225 Chestnut Street.

Q. Go on. What happened?

A. I heard a conversation over the radio.

Q. Where were you?

A. I was still within the government vehicle in which I was driving.

Q. Did you hear Mr. Wu's voice?

A. Yes, sir.

Q. Did you hear the voice of the man you had heard previously?

A. Yes, sir.

Q. Did you hear him addressed by name?

A. Yes, sir.

Q. What name?

A. He again referred to the other individual as Rocky.

Q. All right. Now would you kindly, to the best of your recollection, repeat the conversation?

Mr. Constine. And I understand counsel has the same objection.

Mr. Riordan. Yes.

Mr. Ringole. And I will make the objection that it is incompetent, irrelevant and immaterial.

The Court. Let the record so show.

Mr. Riordan. May I get the date?

Mr. Constine. February 7th—at what time? 11:15 a.m.

Mr. Ringole. The indictment indicates that this conspiracy was consummated on February 1st.

Mr. Constine. It does no such thing, Your Honor. Mr. Ringole is stating something that is not so. The indictment states that a time and place unknown to the Grand Jury these defendants conspired. One of the overt acts set forth happens to be February 1st.

Mr. Ringole. Will you read the indictment? You will see that the sale was on the 1st of February and you will see that the overt acts were all on the 1st of February and those that you prove directly were on the 1st of February with reference to the subject matter of this conspiracy.

Mr. Constine. I might state for the record, Your Honor, so that the record is clear, that in paragraph 1 of the conspiracy count of this indictment it states 'that at a time and place to the Grand Jury unknown, the defendant Yep and Ong, alias Johnny Ong, and others to the Grand Jury unknown did knowingly and willfully conspire together.'

I think that is sufficient for the purposes of this objection.

The Court. The objection will be overruled. Will you proceed." (TR 117-120.)

The Witness (continuing): This particular conversation was at times in Chinese and at times in English. I do not understand Chinese. I overheard the person's voice of Rocky stating that his connection was considering purchasing a new Cadillac. I further heard Rocky to state that he would like to go back to the Orient, and he spoke of the living conditions over there, the rate of exchange. And that's about all I can recall. The defendant Yep left this place and proceeded directly to the San Mateo racetrack. I saw Mr. Ong in the F section of the uppermost stands, and he was in company with defendant Yep. I saw defendant Yep leave. I did not see Mr. Ong leave. (TR 121.) I followed Mr. Yep. He returned immediately to 83 Winfield Street and stayed there a very short time and continued on back into the Chinatown area. I ended my surveillance at that time. I am not sure that I saw Mr. Ong the night of February 7. On February 8, I observed defendant Yep leave his

residence and go directly to 83 Winfield Street where he met defendant Ong. The two entered the 1955 Cadillac and disappeared from my view. I didn't see them until about 3:15 in the afternoon. (TR 122.) The two were seated in the Cadillac at the Union Oil Service Station at Polk and Geary Streets. On the 22nd of February, 1956, I saw Rocky Yep at the headquarters office. I asked him if he was aware of all the sales he had made to federal undercover agents. He stated that he was. He was very cooperative. I asked him about some of his associates. He says, "You have me right". He says, "Can I take the rap alone without involving anyone else?" I said, "Well, how about Johnny Ong?" He says, "Oh, he is a good family man." He says, "You got me; that's it." That is about all the conversation I can recall at this time. (TR 124.)

DANIEL P. ALBEE, called and sworn as a Government witness, testified: I am a salesman at the Cadillac Motor Car Division on Van Ness Avenue in this city. I had occasion to see the defendant Johnny Ong on February 6th of this year. He purchased a Cadillac automobile from my division. (TR 126.) A man by the name of William Chan, who works at the Union Oil Station at the corner of Polk and Geary was with him. The car was a 1955 Cadillac. It was a two-tone. He came back the next day and completed the transaction. The car was purchased by Johnny Ong in the name of Jennie Leong or Jeong. I understood she was Mr. Ong's wife. His name was not on the car. (TR 128.)

On cross-examination the witness testified that a Cadillac 1951 coupe was turned in as part of the purchase price on the car, and that the defendant gave the witness $1400 in cash and an additional $200 which the defendant borrowed from Chan. (TR 129-137.)

CHESTER J. WOLSKI, called and sworn on behalf of the Government, testified: I am a Treasury agent with the United States Bureau of Narcotics and have been so engaged the last two years. On February 1st, 1956 I was on duty that day with other agents surveiling Mr. Yep and Mr. Ong. I did not see either of the defendants on that day. (TR 141.) I was with Agent Stenhouse in a Government vehicle and we observed the defendant Ong driving a Cadillac coming from John Alley into Mason and drive away. I did not see Yep at that time. Then later on we picked up the defendant Yep and we followed him around Chinatown to the area of Pacific and Grant where he parked the car for a time and then we waited for his return and followed him — momentarily lost him and followed him, or rather saw him at Compton's Restaurant at the corner of Geary and Van Ness. Agent Stenhouse went in the restaurant while I parked the vehicle so we would be ready to follow the defendant Yep if he left. They were in there approximately ten or fifteen minutes. I observed the defendant Yep come out to the street and in a few seconds followed by Agent Wu. Then we continued following Yep down to the Chinatown area. Again momentarily we had lost view of him but we did see

him parking the car in the vicinity of Mason and Jackson. (TR 142.) I saw him meet an unidentified Chinese male who was later identified as Johnny Ong. They had a conversation and Johnny Ong drove off in a 1951 Cadillac, license CKC-040. During that time Yep was in and out of the car, walking around the streets. Approximately at 9:30 I had occasion to go over to the drugstore to purchase a pack of cigarettes. As I left the drugstore I observed that the defendant Yep was walking across directly from me on Mason Street, and he entered the drugstore, so I stopped and put the doorway under surveillance on the opposite side of the street. He was in there approximately five minutes. Approximately 10 o'clock I again observed this Cadillac, the same license, and the defendant Johnny Ong, parked on the north side of Jackson facing west, and I saw Johnny Ong get out of the car with a child in his arms and he crossed directly across the street where he was joined by defendant Yep, and they both entered the common doorway of 1003 Jackson Street. In approximately a minute's time I again observed the defendant Yep return to his car, a 1952 Mercury, and drive directly to 225 Chestnut Street. We had a little vehicle trouble so we had to discontinue surveillance. Two days later, on February 7, 1956 I had occasion to see the defendant Yep at 225 Chestnut. I was stationed at the listening post again. I heard a conversation between Agent Wu and the defendant Yep. Yep stated that he advised his friend not to buy the Cadillac because it would draw a lot of attention and explanation.

(TR 145.) On February 22 at approximately 4:30 A.M. we observed Johnny Ong parking his Cadillac in front of his garage driveway at 83 Winfield Street. So we immediately went over there and I identified myself and I told him he was implicated in narcotics. I put him under arrest by saying he was implicated in a narcotic transaction. So I asked him if it would be all right to search the premises. So later on we did that and throughout the search we had an interrogation going on. So I confronted him that he had been observed by numerous agents in the company with defendant Yep. I specifically referred to the night of February 1st, that he was seen with this child driving up in a Cadillac and he and the defendant Yep going in the doorway, to which he remained silent and gave me no answer. In the meantime his wife retorted, "I told you you would get yourself into trouble by fooling around with Rocky." To this again he gave no answer. He remained silent. So I asked him, "What is your source of income for all this?" And I asked him what he had for a job. He said, well, I am unemployed, so I asked him what the source of income was and he told me he was a gambler. He did not have a telephone. (TR 148.)

On cross-examination the witness testified: I did not have a warrant for the defendant's arrest. I had no search warrant for his home. (TR 150.)

Thereupon Government's Exhibits 1 and 2 for identification were introduced against each of the defendants in the case. (TR 153.)

On the following day, April 26, 1956, upon the convening of Court, counsel for the defendant Ong made the following motion (TR 154):

"Mr. Riordan. If it please the Court, at this time I would move to strike or exclude the evidence upon the grounds that the Court overruled my objection as to the incompetency, irrelevancy, and immateriality of the evidence that was produced on this stand as to Johnny Ong, and also as to all hearsay statements that were allowed during the course of this hearing, on the grounds that the same were made outside the presence of defendant Ong; that they were matters that were hearsay, that were allowed into evidence without the establishment of the corpus delicti of the conspiracy, being the agreement, and the fact that whatever hearsay statements are allowed in during the course of this trial were not or could not in any way be construed as matters in furtherance of a conspiracy.

"Now, I will eliminate some of the, perhaps, technical objections that I have. Very briefly now, I am going to object to any statements that were made by the agents, any acts or failure to act in relation to statements made by the agents on the part of Johnny Ong at the time of his arrest, and any statements made by his wife. Obviously, those are complete hearsay, Your Honor. In no way could they be construed as an admission against Mr. Ong or in any way in furtherance of a conspiracy.

"Now, I am going to pass over some technical objections. I will object to those statements at the time of the arrest and after the arrest, on the grounds that the arrest was made after long

surveillance, and obviously, as this sale was at 10:15 the previous evening, there was time, in my opinion, to get a warrant for arrest.

"Another objection I have on that ground is that there was lack of reasonable cause to believe that a felony was being committed or had been committed by Johnny Ong.

"Another objection that I will have, Your Honor, is that a search of the house was made to ascertain, you will recall, as to whether or not there was a telephone in the home of Mr. Ong. I object to any search of Mr. Ong's home, on the ground that no warrent for the search was obtained, they having had plenty of time to obtain the same.

"I also object, Your Honor, to any statements made by Rocky Yep outside the presence of Johnny Ong after Mr. Ong — rather, after Mr. Yep — had been picked up and was in custody; that obviously, even assuming that there had been a conspiracy, it was after the last overt act, and it was at the time of the apprehension and could not, in any way, be construed as a furtherance of a conspiracy." (TR 156.)

The Court denied the said motion. (TR 165.)

Counsel for the defendant Ong also moved for a judgment of acquittal as follows:

"Mr. Riordan. I at this time, Your Honor, move for a judgment of acquittal on behalf of defendant Johnny Ong. It is my understanding of the law, Your Honor, on this particular motion, that it is the sole duty of the trial judge to determine whether substantial evidence, taken in a light most favorable to the Government, tends

to show the defendant guilty beyond a reasonable doubt. Now, it is my contention, Your Honor, that there is absolutely no substantial evidence in this case which would tend to prove this defendant, Johnny Ong, guilty beyond a reasonable doubt.

"Firstly, let me state, Your Honor, just in opening, that I believe the defense of entrapment is properly before this Court. My recollection—again I may be wrong on it, but I will put it forward to the Court—is that on the first day of February, 1956, Mr. Wu telephoned Mr. Yep and asked him to come to his apartment. I submit to the Court that the facts as shown before this Court are evidence of entrapment on the part of the Government, through Mr. Wu, to have Mr. Yep engage in the sale of narcotics on that particular day. If that be true, then it in turn inures to the benefit of defendant Ong.

"Again, Your Honor, I submit—or I state at this time—that there is no substantial evidence before the Court from which this Court can state that, beyond a reasonable doubt, a conspiracy has been proven on the part of Mr. Ong and Mr. Yep. There is no evidence of knowledge by Johnny Ong as to any acts or intentions on the part of Mr. Yep. There was no evidence of any intent on the part of Johnny Ong to deal in narcotics in any fashion. There was no evidence of a mutuality of intention and act on the part of Johnny Ong and Mr. Yep to deal in narcotics." (TR 154-165.)

The Court denied the said motion. (TR 165.)

ONG WAY JONG, also known as JOHNNY ONG, called and sworn on his own behalf, testified: I am

twenty years of age. I never sold or dispensed or disposed of any narcotics to Rocky Yep. I never agreed with Mr. Yep to sell or dispense or dispose or agree to conceal or transport any narcotic drugs. (TR 176.) I have known Rocky Yep about ten years. I have gone around with him for some time and have been friendly with him. I never discussed the fact that I would give him my automobile or any automobile that I owned as security to have anything to do with narcotics dealings. I do not remember making any reply to the accusation of the agents when they arrested me that I was part of a narcotics ring. (Tr. 178.) The only thing I recall, on February 1, is that the little boy was with me because that night I took him to the barber shop. That was his first haircut. I have two children. (TR 179.) I do not recall being at the Bay Meadows racetrack the day I purchased this automobile. Rocky Yep used to come to my home three or four times a week. I do not recall Rocky Yep getting into my automobile around 3 or 3:30 or 3:50 in the afternoon of February 1. When I went to the barber shop the barber was not in so I drove up to Lucy's Place and Lucy was not in. I arrived back at the barber shop a little after 7. My regular barber was in and he was kind of busy and he told me to come back after closing time. I went up to Lucy's sister-in-law's apartment. It was in the same building on Jackson Street. On my second trip to Lucy's I saw Rocky Yep. I went in there and watched TV for about twenty minutes and the whole bunch of us left. Then I left about nine o'clock. Then I went back to the barber shop and the little boy got a haircut. (TR

181.) Then I returned to Jackson Street around 10 o'clock and saw Rocky Yep sitting in his car in front of Duck Fong's place. My little boy was still with me. Then I went up to Duck Fong's and played mah jong. I think Rocky stayed there for about five or ten minutes when he left. At none of these meetings that I have referred to was there any mention of any dealings in narcotics between Yep and me. Neither at that time nor prior to that time did I have any agreement with Mr. Yep that I would have anything to do with narcotics. (TR 185.)

On cross-examination the witness testified:

I have been committed *(sic)* of a felony in Los Angeles. I was charged with possession of heroin and pleaded guilty to it. I did not know that Yep was dealing in narcotics and never discussed it with him. (Tr. 190.)

WILLIAM CHAN, called and sworn on behalf of defendant Jong, testified: I was the owner of an automobile before February 7, 1956, a 1953 Cadillac coupe. I turned it over to the defendant Johnny Ong because I could not keep up the payments and insurance, and it was a good opportunity for me to get rid of the car. The Cadillac people took the car and they wholesaled it out to a wholesaler and then they paid off the bank for me and the balance of the car was put toward Johnny Ong's car. (TR 204.) I was with him when he handed over a certain amount of cash to the Cadillac people. I gave him $200 because he didn't have enough on him to pay the balance of the car. (TR 204.)

HELEN ONG, called and sworn on behalf of defendant Jong testified: I am the sister of the defendant Johnny Ong. I recall his buying a 1955 Cadillac. I lent him $300 for that purpose. (TR 206.)

EDWARD ONG, called as a witness on behalf of the defendant Jong testified: I am the brother of the defendant Johnny Ong. I recall my brother getting a 1955 Cadillac. I loaned him $1200 to buy the car. (TR 211.)

Thereupon, after argument of counsel, the District Court made the following order:

> "I find both of the defendants guilty as charged in the indictment on counts one, two and three." (TR 213.)

Thereafter, and on May 4, 1956, the defendant Ong, moved for a new trial upon the grounds:

1. That the Court erred in denying his motion for a judgment of acquittal;

2. That the verdict was contrary to the weight of the evidence;

3. That the verdict was not supported by the evidence;

4. That the Court erred in admitting the testimony of all Government witnesses to which objections were made.

Counsel for the defendant Ong also moved for a judgment of acquittal.

Thereupon, after argument of counsel, the Court denied the motion for a new trial and the motion for a judgment of acquittal. (TR 235.)

Thereupon the Court sentenced the defendant Ong to be imprisoned for a period of five years and to pay a fine of $1.00. This sentence was imposed May 10, 1956 and on May 17, 1956, (TR 236) appellant filed his notice of appeal to this Court and designated the complete record and all the proceedings and evidence as the record on appeal. (TR 18, 22.)

SPECIFICATION OF THE ERRORS RELIED UPON.

1. The evidence was insufficient to justify the judgment of conviction;

(a) The *corpus delicti,* that is, the conspiracy itself, was not established;

(b) There was no competent evidence to establish the existence of any conspiracy between appellant and WEE ZEE YEP;

(c) The only evidence of any participation of appellant with any transaction in narcotics consisted of hearsay acts and declarations of the alleged co-conspirator, which were incompetent to establish the conspiracy, and which were not binding upon the appellant.

2. The District Court erred in denying the motions of appellant for a judgment of acquittal.

3. The District Court erred in denying appellant's motion for a new trial.

4. The trial Court erred in admitting, over the objection of appellant, the hearsay testimony of Milton K. Wu as to his dealings and conversations with

the alleged co-conspirator, Wee Zee Yep, all of which were out of the presence of the appellant whom the witness testified that he never saw at any time prior to his arrest. (TR 61.)

In this behalf we ask to be relieved of the provisions of Subdivisions (d) of Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit; which provides:

> "When the error alleged is as to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for objection and the full substance of the evidence admitted or rejected."

We make this request for the reason that full compliance with the provisions of the rule would necessitate the reprinting of all of the testimony of the witness following the objection made by appellant's counsel at page 38 of the transcript. The full substance of this evidence has been heretofore set forth in the abstract of the case, to which we hereby refer, submitting that the restatement of this evidence should be omitted in the interest of brevity.

5. The trial Court erred in admitting in evidence alleged accusatory statements made in the presence of the appellant as testified to by the witness Hipkins, as follows, to-wit:

> On February 22, 1956, I had occasion to arrest the defendant Johnny Ong in the presence of Agent Wolski. We arrested him in front of his home at approximately 4:30 A.M. on the 22nd of February. He had just drove up (*sic*) in his

1955 Cadillac. After the arrest while we were searching the place for narcotic contraband, we interrogated Johnny Ong. We had no search warrant. (TR 89.) I am not sure whether a complaint had been filed before the Commissioner. I don't know whether we had a warrant for his arrest. We told him he was under arrest. We identified ourselves and said he was under arrest and had been implicated in the narcotic transactions with the defendant Rocky Yep. This was on the same night, extending into the next day. Rocky was arrested on the 21st late and this was 12:30 a.m. on the 22nd. I don't know whether he was brought before the Commissioner on the 23rd when the Commission was in session. After the arrest we booked him at the County Jail.

Thereupon the following proceedings were had:

"Mr. Constine. Q. Will you kindly repeat the conversation? Tell us what was said.

A. At that time I accused the defendant Ong of delivering a quantity of narcotics to Rocky on February 1st and it was my opinion that the night——

Q. Wait; is this what you were telling him?

A. Yes; it was my opinion that he had concealed the narcotics in the diaper of the child due to the fact that yellow stains were found on the container.

Q. This was what you had advised Mr. Ong?

A. Yes, and at this time——

Q. Go ahead.

A. At this time his wife came in and said that 'I told you you would get into trouble!'——

Mr. Riordan. I am going to object again, Your Honor. May my objection go to all of this

testimony as being incompetent, irrelevant and immaterial again and bringing in hearsay, and the conspiracy and the overt acts in relation to any conspiracy have not been established.

The Court. The objection will be overruled. He is entitled to what occurred at that time and place, what was said, if anything.

Mr. Constine. Q. You accused him of engaging in this narcotic transaction; is that correct?

A. Yes.

Q. And the wife said to the defendant Ong in Ong's presence, 'I told you you would get in trouble'?

A. 'I told you you would get into trouble running around with Rocky.'

Q. And what if anything did Mr. Ong say in reply to your accusation?

A. He said nothing at that time.

Q. Did he make any statement at all?

A. Nothing. He said nothing." (TR 92.)

6. The trial Court erred in admitting in evidence the testimony of the witness Wolski:

"On February 22 at approximately 4:30 A.M. we observed Johnny Ong parking his Cadillac in front of his garage driveway at 83 Winfield Street. So we immediately went over there and I identified myself and I told him he was implicated in narcotics. I put him under arrest by saying he was implicated in a narcotic transaction. So I asked him if it would be all right to search the premises. So later on we did that and throughout the search we had an interrogation going on. So I confronted him that he had been

observed by numerous agents in the company with defendant Yep. I specifically referred to the night of February 1st, that he was seen with this child driving up in a Cadillac and he and the defendant Yep going in the doorway, to which he remained silent and gave me no answer. In the meantime his wife retorted, 'I told you you would get yourself into trouble by fooling around with Rocky.' To this again he gave no answer. He remained silent." (TR 146, 147.)

7. The Government officers were **agents provocateur** and the conviction cannot be sustained.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Aside from the hearsay declarations of Wee Zee Yep to Agent Wu, there is not even a scintilla of evidence to connect appellant with the sale of any narcotics or with the conspiracy charged in the third count of the indictment. Aside from the hearsay, there is no proof of the *corpus delicti,* which can never be established by hearsay evidence. The admission of the hearsay statements of the alleged co-conspirators was manifest and pernicious error. The admission in evidence of the accusatory statements of the agents made after the appellant's arrest, and undenied by him, was reversible error under a long line of decisions, including well considered opinions by this court. The evidence shows beyond all cavil that the genesis of the alleged offense of the sale of heroin charged as one of the overt acts in the con-

spiracy was in the mind of the agents who solicited and importuned the commission of the offense, thereby rendering the conviction void, under a long line of decisions, both State and Federal, including an array of cases decided on this Circuit.

I.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE CONVICTION.

It should seem too clear to require citation of authorities or extended argument, that in a prosecution for conspiracy, as in all other criminal prosecutions, the defendant can only be convicted of the offense with which he is charged, and of that only by evidence which, whether it be direct or circumstantial, establishes his guilt beyond all reasonable doubt. Mere suspicion and conjecture are never sufficient to convict. Moreover, in a trial for conspiracy, as in all other prosecutions for crime, the *corpus delicti* must be established. Before one can be convicted of a crime it must first be shown that a crime was committed. The accused cannot be convicted even upon his own confession, unless the *corpus delicti* be established otherwise. In prosecutions for conspiracy, the conspiracy itself is the *corpus delicti,* and it must be proven by evidence which convinces the jury beyond a reasonable doubt.

We repeat that it should be unnecessary to cite the authorities in support of a rule of law so well settled

that it should be familiar to the veriest tyro at the bar; but in view of the proclivity of Government prosecutors in these days to demand convictions on the most far-fetched theories, it may be well to briefly call to the attention of the Court a few Federal and State decisions.

In *Wyatt v. United States,* 23 Fed. 2d 791, it was held that where any large conspiracy is specifically charged, proof of different and disconnected smaller ones will not sustain a conviction, and that proof of a crime committed by one defendant without relation to the other alleged conspirators is insufficient evidence to sustain a conviction for conspiracy.

In *Langer v. United States,* 76 Fed. 2d 817, it is held that proof of an unlawful agreement and of defendant's participation therein, with knowledge of the agreement, is essential in a prosecution for conspiracy, and that **mere evidence of participation in the offense which is the object of the conspiracy,** is insufficient.

In *Shannabarger v. United States,* 99 Fed. 2d 957, 961, the Court says:

> "It is a settled rule of law that 'in conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, **the conspiracy itself,** is the gist of the action and is the *corpus deliciti* of the charge.' The agreement, must, therefore, be established before a conviction can be sustained. *Tingle v. U. S. 8 Cir.,* 38 Fed. 2d 573, 575. The agreement, however, is a fact which, like most other disputed facts, may be proven by circumstantial evidence. Where the government relief upon circumstantial

evidence to establish the conspiracy, **the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement,** and the doing of some overt act, to affect its object. See *Marx v. U. S. 8 Cir.,* 86 Fed. 2d 245, 250. Further the circumstances relied upon must be not only consistent with the guilt of defendants, but must be inconsistent with their innocence. *Spolitto v. U. S. 8 Cir.,* 39 Fed. 2d 782; *Salinger v. U. S. 8 Cir.,* 23 Fed. 2d 48; *Langer v. U. S. 8 Cir.,* 76 Fed. 2d 817."

In *Young v. United States,* 48 Fed. 2d 26, a conviction of conspiracy was reversed because there was **no evidence** that the defendants **"were acting in concert; for all that appears, each was acting only for himself."**

In *Cartello v. United States,* 93 Fed. 2d 412, the defendants were convicted of conspiring to injury citizens in the free exercise of their rights through the alteration of ballots in a general election. Reversing the conviction, the Court says:

"We again advert to the fact that aside from the evidence in support of an overt act, there is no evidence tending to show a conspiracy among these defendants. In the absence of such proof, proof sufficient to connect one of the defendants with the erasures and alterations on these ballots would, of course, be wholly insufficient to warrant a wholesale conviction of the other defendants. **A conspiracy is the gist of the offense, and that conspiracy must be proven beyond a reasonable**

doubt, either by direct or circumstantial evidence, or both. *Langer v. United States,* (C.C.A.8), 76 Fed. (2d) 817; *Dahly v. United States* (C.C.A.8), 50 Fed. 2d 37; *Tingle v. United States* (C.C.A. 8), 38 Fed. 2d 573, 575.

"As said in *Tingle v. U. S.,* supra:

'In conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action and is the *corpus delicti* of the charge. It is, therefore, primarily essential to establish the existence of a confederacy or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained.' "

In *Tingle v. United States,* 38 Fed. 2d 573, cited in the foregoing decision, the Court concludes with language that should be decisive in the case at bar:

"It is apparent from the record before us, and was, in effect, assumed at the hearing, that appellant was guilty of a substantive violation of the National Prohibition Act. That, however, standing alone, furnishes no support of a conspiracy charge."

True, there is evidence in the record that appellant and Yep were seen together upon a number of occasions, but that is certainly no evidence that they had entered into a conspiracy. Thus in *People v. Howard,* 58 Cal. App. 340, 208 Pac. 1022, it is said:

"It certainly would involve a proposition quite perilous to the liberty of many decent and law respecting citizens if it were true that the mere

circumstance that a person may be found in the company of a person known to have committed a larceny was to be regarded as evidence legally sufficient to establish his complicity in the commission of such crime. But that circumstance alone is not sufficient to establish guilt, and, as that is all that was shown against the three defendants we are now referring to, it is very clear that nothing approaching a legal case of guilt was made against them."

In *People v. Long,* 7 Cal. App. 27, 93 Pac. 387, it is said at page 33 of the state report:

"Conspiracy cannot be established by suspicions. There must be some evidence. **Mere association does not make a conspiracy.** There must be evidence of some participation or interest in the commission of the offense."

In *Dong Haw v. Superior Court,* 81 Cal. App. 2d 153, 183 Pac. 2d 724, it is said:

"Conspiracy cannot be established by suspicions. There must be some evidence. **Mere association does not make a conspiracy.** There must be evidence of some participation or interest in the commission of the offense."

In *Jensen v. Superior Court,* 96 Cal. App. 2d 112, 214 Pac. 2d 828, it is said:

"Where the evidence is wholly circumstantial and in every respect is reasonably consistent with innocence, the mere fact that the circumstances may also be reconciled with guilt will not justify an indictment. The Grand Jury may not resolve all implications in favor of guilt by substituting the presumption of guilt for one of innocence."

In the case just cited, the District Court of Appeal of the State of California for the Second District issued a peremptory writ of prohibition to restrain the Superior Court from trying the case for the reason that the defendant had been indicted without reasonable or probable cause. Yet the evidence in that case was far stronger than in the case at bar.

In conclusion, the appellant, Ong Way Jong respectfully submits that if the inadmissible hearsay evidence and the illegally obtained evidence were rejected in this matter, as it properly should have been, the United States Government would not prove its alleged case of conspiracy against the appellant beyond a reasonable doubt, and in fact, would not prove its case by even a preponderance of the evidence. This conclusion is based upon the fact that if the said illegally obtained evidence and improper hearsay evidence is rejected, the following constitutes the evidence in its entirety as introduced against the appellant and purports to show that the appellant is guilty of the offenses as charged, and this appellant respectfully submits that as a matter of law, the evidence is insufficient to justify judgment:

1. The Government witness, Bruce E. Hipkins, a Federal Narcotics Agent, testified that on February 1, 1956, at about 2:15 p.m., the co-defendant drove to appellant's home and later left; that on the same date at 3:55 p.m. the said Hipkins saw this appellant driving an automobile and that the co-defendant was riding in this appellant's automobile; that at 8:30 p.m. an automobile resembling this appellant's automobile

was seen in the vicinity of where the co-defendant was; that at 10 p.m. the same evening, two of them walked across the street into a doorway (the appellant allegedly carrying a child in his arms); that on February 7, 1956, the co-defendant went to Bay Meadows Racetrack and the appellant was seen with him and further on the same day the co-defendant went to appellant's home and later the co-defendant went to the appellant's automobile.

2. The Government witness, Eldon R. Przibor-owski, testified that on February 1, he saw this appellant riding in an automobile with the co-defendant and later saw this appellant's automobile driving away; that later this appellant's car returned to the same scene and the appellant with a child in his arms crossed into a doorway with the co-defendant and one minute later the co-defendant left.

3. John A. Stenhouse, a Treasury Agent of the United States Government, testified on behalf of the Government, that he saw the appellant and the co-defendant at the Bay Meadows Racetrack in the afternoon on February 7, 1956; that on February 6 he saw the co-defendant and the appellant at the Cadillac Agency in San Francisco looking at automobiles; that on February 8 the co-defendant and appellant drove away from the appellant's home together.

4. Daniel P. Albee, a Cadillac automobile salesman, testified for the Government and stated that the appellant was at his offices during the time the hereinabove mentioned Federal Agents testified that the

appellant was at the Bay Meadows Racetrick with the co-defendant.

The above evidence constitutes the only admissible evidence against the appellant on the charge of conspiracy and it is appellant's contention that the admission of the illegally obtained evidence without a search warrant and the inadmissible hearsay evidence which was admitted at the trial of this action together with the admission of evidence relating to prior transactions of the co-defendant together with evidence which was admitted concerning transactions on or about the 21st day of February, 1956, which evidence was admitted only as against the co-defendant constituted prejudicial error which deprived this appellant of a fair and just trial. The appellant submits that there is a lack of any showing of a conspiracy and/or of the commission of an Overt Act in the perpetration of a conspiracy.

II.

THE DISTRICT COURT ERRED IN DENYING THE MOTIONS OF APPELLANT FOR A JUDGMENT OF ACQUITTAL.

The decisions supporting this contention have been fully set forth in the preceding subdivision of this brief.

III.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

The decisions in support of this contention, so far as the sufficiency of the evidence is involved, have been heretofore set forth in subdivision I of the Argument in this brief; and insofar as errors in the reception of evidence are involved, they will be set forth in the next succeeding section.

IV.

THE TRIAL COURT ERRED IN ADMITTING, OVER THE OBJECTION OF APPELLANT, THE HEARSAY TESTIMONY OF MILTON K. WU AS TO HIS DEALINGS AND CONVERSATIONS WITH THE ALLEGED CO-CONSPIRATOR, WEE ZEE YEP, ALL OF WHICH WERE OUT OF THE PRESENCE OF THE APPELLANT, WHOM THE WITNESS TESTIFIED THAT HE NEVER SAW AT ANY TIME PRIOR TO HIS ARREST.

It should be wholly unnecessary to argue that the existence of a conspiracy and appellant's alleged participation therein, could not be established by any narrative or anticipatory statements of Yep, made out of the presence of the appellant.

> "To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."
>
> *Minner v. United States,* 57 Fed. 2d 506, 511, citing *Pope v. United States,* 289 Fed. 312, 315;
>
> *Kelton v. United States,* 294 Fed. 491, 495;

Isenhouer v. United States, 256 Fed. 843;
United States v. Richards, 149 Fed. 443;
Burns v. United States, 279 Fed. 982;
Stager v. United States, 233 Fed. 510.

Also cited by the Court in the *Minner* case is the opinion of this Court in *Dolan v. United States,* 123 Fed. 52, in which it was held that declarations, tending to show the existence of a conspiracy between the person making them and the person to whom they were made, were inadmissible against a third person not shown to have been connected with the alleged conspiracy. To state the matter otherwise,—the connection of the defendant with the conspiracy cannot be established by the acts and declarations of his alleged co-conspirators.

In *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680, the Supreme Court of the United States, dealing with the contention made by the Government that the declarations of one conspirator in furtherance of the objects of the conspiracy made to a third party are admissible against his co-conspirators, uses this language at 315 U.S. 74, 62 S.Ct. 467:

> "Such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. **Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.**"

In the comparatively recent case of *Krulewitch v. United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed.

790, the Supreme Court of the United States reversed a conviction of violating the so-called Mann Act for the admission in evidence of a conversation had between the prosecutrix and a woman who was an alleged co-conspirator with the defendant in which it was claimed that the latter made statements which implied that the defendant was guilty of the crime for which he was on trial.

In the majority opinion of the Court written by Justice Black we read the following language:

> "It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. Cf. *Lew Moy v. United States* (CCA 8th) 237 Fed. 50. The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because, if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking. *Fiswick v. United States,* 329

U.S. 211, 216, 217, 91 L. Ed. 196, 200, 201, 67 S.Ct. 224; *Brown v. United States,* 150 U.S. 93, 98, 99, 37 L. Ed. 1010, 1013, 14 S.Ct. 37; *Graham v. United States* (CCA 8th, Okla.) 15 Fed. 2d 740, 743."

In *Fiswick v. United States,* 329 U. S. 211, 67 S.Ct. 224, 91 L. Ed. 196, it is held (syllabus 1. (3)) that a

> "confession or admission by one co-conspirator after he was apprehended was not in furtherance of the conspiracy to deceive the Government, but had the effect of terminating the conspiracy, so far as he was concerned, and made his admissions inadmissible against his erstwhile fellow-conspirators."

Independent of the evidence complained of, there is no proof connecting appellant with any alleged conspiracy, or with any other crime.

V.

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE ALLEGED ACCUSATORY STATEMENTS MADE IN THE PRESENCE OF THE APPELLANT AS TESTIFIED TO BY THE WITNESS HIPKINS.

No rule of law is better settled than the rule that hearsay declarations are nonetheless hearsay because uttered in the presence of the defendant. In the Federal Courts, the general rule is that one who is in custody charged with a crime, is under no duty to deny an accusatory statement made in his presence, because he has the constitutional right to stand mute,

and any statement that he may make is always evidence against him and never evidence in his favor.

In *Yep v. United States,* 83 Fed. 2d 41, it is said:

> "When one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and statements tending to implicate him, made in his presence and hearing by others when he is under arrest or in custody, although not denied by him, are not admissible against him."

In *McCarthy v. United States,* 25 Fed. 2d 298, the Circuit Court of Appeals of the Six Circuit says:

> "Where accusatory statements are made in the presence of a respondent and not denied, the question whether his silence has any incriminating effect depends upon whether he was under any duty or any natural impulse to speak. Sometimes or often, in the earlier stages of the matter, there may be such a duty or impulse; but, after the arrest and during the official examination, while respondent is in custody, it is common knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, **'If you say anything, it will be used against you; if you do not say anything that will be used against you.'** See comments of Shaw, C. J. in *Com. v. Kenny,* 12 Metc. (53 Mass. 235, 46 Am. Dec. 672; *Com. v. Walker,* 13 Allen (Mass.) 470;

Com. v. McDermott, 123 Mass. 440, 25 Am. Rep. 120; *Porter v. Com.* (Ky), 61 S.W. 16, 17, and citations; *State v. Weaver,* 57 (Iowa) 730, 11 N.W. 675. Also comment of Judge Learned Hand in *Di Caralo v. United States,* (C.C.A. 2), 6F 2d 364, 366."

In *Merriweather v. Commonwealth,* 118 Ky. 870, 92 S.W. 592, it is said by the Kentucky Court of Appeals:

"One cannot be compelled, when not offering himself as a witness in his own defense, to give evidence in court tending to incriminate himself. Much less should he be compelled to do so out of court. If silence in such case is evidence of guilt, then one charged with crime must, under penalty of himself creating most damaging evidence against himself in support of the charge, enter into a controversy of words with ever idle straggler who may choose to accuse him to his face. He must parry every cross-examination attempted by every self-appointed questioner. He must, though not addressed, continually shout a denial of every fugitive statement tending to implicate him that may reach his ears. He must hazard answering accurately every statement so made, or have his silence construed as evidence of his having admitted not only what the witness then said, but possibly now says was then said. Courts have been called upon to apply such facts to that part of the rule above quoted, which says that the accused must not only have an opportunity to respond to the statement sought to be fastened upon him as an admission, but that the circumstances must be such as 'naturally and

properly call for some action or reply from men similarly situated.' "

The question was definitely and finally settled by this Court in *Poole v. United States,* 97 Fed. 2d 423, reversing a conviction in a narcotics case for the admission in evidence of an accusatory statement made in the presence of the defendant, and the refusal to strike the said testimony from the record.

VI.

THE GOVERNMENT OFFICERS WERE AGENTS PROVOCATEUR AND THE CONVICTION CANNOT BE SUSTAINED.

In support of this contention we need only refer to the testimony of Agent Wu. It appears that the agent constantly insisted that Yep procure narcotics from him, offering money and resorting to repeated importunities and cajolery in order to procure the prohibited drug and to make an arrest.

The Courts of this country, without dissent, have established the rule that public policy prohibits the conviction and punishment of those who have been induced and persuaded to violate the law by public officers. This rule is often referred to by judges and and lawyers as **the doctrine of entrapment.** The phrase is unfortunate, misleading and inaccurate. Entrapment of a criminal is legal. The police may set decoys to catch him. They may act the part of feigned accomplices, apparently acquiescing in the commission of the offense, conceived and in process of execution

by the criminal. **But they cannot create crime; they cannot make criminals.** The English language, powerful as it is, contains no word or phrase which aptly describes the police spy who suggests and importunes the violation of the law. We must resort to the French, in which such a person is designated as an **agent provocateur**—one who provokes or creates the crime. That loathsome calling has been aptly characterized by Lord Macaulay in his Essay on Barere as "an occupation compared to which the life of a beggar, of a pickpocket or of a pimp would be honorable."

Both State and Federal Courts have condemned such conduct as that of the officer in the case at bar in unmeasured terms. It has been characterized by Chief Justice Campbell of the Supreme Court of Michigan, in *People v. McCord,* 76 Mich. 200, 42 N.W. 1106, as "a diabolical business which, if not punished, probably ought to be", and again as, "a disgrace to the law", and as "scandalous and reprehensive."

In *Love v. People,* 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710, the Court said:

> "Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished."

In the earlier case of *Saunders v. People,* 38 Mich. 218, 221, the Court reprobates and disapproves the suggestion by officers made even to a person under suspicion, that he violate the law. The eloquent words of Judge Marston are not only worthy of quotation

but are a moral sermon which should be heeded by every officer of the law:

> "The course pursued by the officers in this case was utterly indefensible. . . . **Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation.** Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction."

In *Casey v. United States,* 276 U. S. 413, 48 S.Ct. 373, 74 L. Ed. 632, the Supreme Court of the United States, by a bare majority of five to four, affirmed the conviction because the question of entrapment had not been raised in the trial Court. In point of fact, it was raised for the first time in the reply brief filed by appellant in the Circuit Court of Appeals. Nevertheless, Justice Brandeis, in a dissenting opinion, which has later been cited as authority in prevailing opinions (see *Sorrells v. United States,* 287 U.S. 435), held, and we think held correctly, that the question could never be raised too late because the rule is one of public policy designed, **not for the protection of the defendant, but for the protection of society.**

> "Their conduct is not a defense to him. For no officer of the government has power to authorize the violation of an act of Congress, and no conduct of an officer can excuse the violation. But

> it does not follow that the court must suffer a detective-made criminal to be punished. To permit that would be tantamount to a ratification by the government of the officer's unauthorized conduct. . . . **This prosecution should be stopped . . . in order to protect the government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.''**

The cases which condemn the instigation of crime by officers, and hold that convictions obtained by such methods cannot stand, are so numerous and are so familiar to all practicing lawyers or members of the legal profession, who possess even an elementary knowledge of criminal law, that mere citation of the leading decisions will be sufficient:

United States v. Adams, 59 Fed. 674;
Woo Wai v. United States, 223 Fed. 412;
Sam Yick v. United States, 240 Fed. 60;
Peterson v. United States, 255 Fed. 433.

These four decisions **are by this Court,** and are therefore entitled to peculiar respect. Among the numerous other decisions are:

Voves v. United States, 249 Fed. 191;
Newman v. United States, 299 Fed. 128;
Capuano v. United States, 9 Fed. 2d 41;
Silk v. United States, 16 Fed. 2d 568;
Jorl v. United States, 19 Fed. 2d 891;
Cline v. United States, 20 Fed. 2d 494;
United States v. Washington, 20 Fed. 2d 160.

See also: *Butts v. United States,* 273 Fed. 35, which is characterized as ''the leading case'' by Chief Jus-

tice Hughes in *Sorrels v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L. Ed. 413, in which the rule is reiterated with the citation of many earlier authorities.

The language of Circuit Judge Sanborn, in *Butts v. United States,* supra, is decisive of the question presented by the case at bar:

> "**The first duties of the officers of the law are to prevent, not to punish crime.** It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it."

Newman v. United States (C.C.A. 4th), 299 Fed. 131, will also bear quotation:

> "It is well settled that decoys may be used to entrap criminals, and to present opportunity to one intending or willing to commit crime. But decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime. When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act,

and government is estopped by sound public policy from prosecution therefor."

We submit that it is high time that the Courts put an end, once and for all, to the scandalous, disgraceful, and all too common practice of officers and agents who deliberately create crime in order to make arrests and secure convictions for the purpose of establishing a record for efficiency, if not, indeed, from baser motives. Such methods should not be sanctioned by any American Court, and the only way to put an end to their employment is to reverse convictions so obtained.

CONCLUSION.

It is respectfully submitted that, other than the incompetent evidence erroneously admitted, there is not a scintilla of evidence to sustain the charge. Even with the incompetent evidence, we have nothing here to show that appellant supplied Yep with the narcotics which the latter sold to the officer, or that he was a party to any conspiracy to commit any of the offenses mentioned in the third count of the indictment. For the errors herein alleged, and for the abhorrent conduct of the officers of the Government, it is respectfully submitted that the judgment appealed from should be reversed, and the cause remanded to the District Court with directions to dismiss the in-

dictment against appellant, and to discharge him therefrom.

Dated, San Francisco, California,
November 14, 1956.

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